

- 47.2 The ED&F Man Applicants did not bear any or any substantial economic risk in respect of their acquisition of the shares, including by reason of the hedging transactions which were entered with or through ED&F Man.
- 47.3 Settlement of the ED&F Man Applicants' purchase of the shares was, at least in some cases, back-to-back with the ED&F Man Applicants' sale of the shares, such sale being used to finance the acquisition;
- 47.4 The ED&F Man Applicants had no or no substantial control over the disposition of the shares, including by reason of:
- (a) ED&F Man's alleged Re-Hypothecation Rights;<sup>44</sup> and (b) clauses 5.1(c), 13.2, 14, 17.2 and 17.5 of the Security and Set-Off Deed ("**Set-Off Deed**"). In paragraph 17.2 of ED&F Man's response to SKAT's Request for Further Information dated 1 March 2019, ED&F Man avers that it had the power to use and/or dispose of and/or replace the shares prior to the settlement date (implicitly, without the consent of the ED&F Man Applicants);
  - (b) Pursuant to clause 13.2 of the Set Off Deed, until all secured liabilities had been discharged in full, ED&F Man was not obliged to act on any instructions from the WHT Applicants without the consent of the "Chargee" (namely, itself).
- 47.5 The ED&F Man Applicants did not receive or retain the large majority of the economic benefit of the dividends or WHT refunds received purportedly on their behalf. For example, Goal and Acupay paid the sums received by them from SKAT to ED&F Man after deducting their fees.<sup>45</sup> Similarly, at least until June 2014, ED&F Man received all sums in response to ED&F Man Applications made by Global Equities directly from SKAT.<sup>46</sup>
- 47.6 The ED&F Man Applications were part of a trading scheme that was created for the sole purpose of manufacturing a claim to a WHT refund including by

<sup>44</sup> See paragraph 17.2 of ED&F Man's Response to SKAT's Request for Further Information dated 1 March 2019.

<sup>45</sup> Re-Amended Schedule 5T to RRAPOC, paragraph 8.

<sup>46</sup> Re-Amended Schedule 5T to RRAPOC, paragraph 8.

identifying, procuring or assisting in the formation of seemingly eligible applicants for WHT refunds. There was no other commercial rationale for such trading, which did not result in any other material profits for any of the parties.

**The Principal WHT Scheme,<sup>47</sup> and the trading scheme on which the ED&F Man Applications were based, were created for the sole purpose of obtaining tax relief**

48. As explained in paragraph 45.7 above, one of the factors that Danish law will take into account in deciding whether a WHT refund applicant was the beneficial owner of dividend is whether the WHT refund applicant was set up for the sole or main purpose of obtaining the benefit(s) of a double tax treaty.
49. In addition, Danish law and international tax law recognise a separate, and more general principle, against abusive reliance on double tax treaties. According to this principle, the benefit of double tax treaties is not available to WHT refund applicants if the sole or main purpose of their participation in the relevant transactions (or the sole or main purpose of the transactions) was to secure a favourable tax position. This principle is reflected in the Article 10(6) of the “**Denmark-UK Treaty**”,<sup>48</sup> set out in Section CF.8.2.2.1.1 of SKAT’s External Legal Guide<sup>49</sup> and recognised in the OECD Commentary at page 72-74 (paragraph 57-65) and page 235 (paragraph 12.5) and in the case law of Danish courts.
50. As set out in paragraph 46.8 above, the sole purpose of the Principal WHT Scheme (alternatively, the Solo WHT Scheme, alternatively the Donaldson/LaRosa WHT Scheme, alternatively the Klar WHT Scheme) was to manufacture claims for WHT refund.<sup>50</sup> As explained in paragraph 47.6 above, the ED&F Man Applications were based on a trading scheme that was created for the sole purpose of manufacturing a claim to a WHT refund. As such, even if the WHT Refund Applicants had been able to satisfy all the elements required by the text of the Double Tax Treaties, they would not have been entitled to a WHT refund.

<sup>47</sup> Alternatively, the Solo WHT Scheme, the Donaldson/LaRosa WHT Scheme and/or the Klar WHT Scheme.

<sup>48</sup> The Convention between the Kingdom of Denmark and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention Evasion with Respect to Taxes on Income and Capital Gains.

<sup>49</sup> The current version of SKAT’s External Legal Guide is dated 31 January 2020.

<sup>50</sup> RRAPOC, paragraphs 24(i)(ii)(b) and 24(i)(iii)(A).

**The WHT Refund Applicants that were US pension plans did not satisfy the requirements of the Denmark-US Treaty**

51. Pursuant to Article 10(3)(c) of the Denmark-US Treaty, the WHT Refund Applicants that were US pension funds (“US WHT Applicants” and “US ED&F Man Applicants”; together, the “US WHT Refund Applicants”) had to satisfy two additional requirements in order to make a valid WHT refund application:

51.1 they had to be “*pension funds*” within the meaning of Article 22(2)(e) of the Treaty; and

51.2 the dividends they received should not have been “*derived from the carrying on of a business*”.

52. The US WHT Refund Applicants did not satisfy these requirements.

**The US WHT Refund Applicants were not “*pension funds*” within the meaning of Article 22(2)(e)**

53. In order to be a “*pension fund*” within the meaning of Article 22(2)(e) of the Denmark-US Treaty, the US WHT Refund Applicants had to have been “*organized under the laws of a Contracting State to provide a pension or other similar benefits to employees*” i.e. they had to have had tax-exempt status under §401(a) of the US Internal Revenue Code (“IRC”).

54. §401(a) of the IRC imposes three (relevant) requirements:

54.1 the pension fund must be created and organised for the exclusive benefit of an employer’s employees;

54.2 the pension fund must be a permanent, rather than a temporary, program; and

54.3 the funding of the pension fund must comply with the contribution rules in the IRC.

55. The US WHT Refund Applicants did not satisfy these requirements for the reasons set out below.

56. The US WHT Applicants were not set up for the exclusive benefit of an employer's employees. Rather:

56.1 They were established by shell corporations that conducted no trade or business and therefore had no legitimate employees.

56.2 They were set up by or on behalf of the persons set out at paragraph 46.7(a) above to enter into purported transactions that would ostensibly generate a claim for WHT refund.<sup>51</sup>

56.3 As explained in paragraphs 46.7 and 46.8 above, the ultimate beneficiaries of the WHT refunds obtained by the US WHT Applicants were the Alleged Fraud Defendants,<sup>52</sup> the other parties identified in Schedule 7 to the RRAPOC and certain other conspirators to be identified following disclosure and evidence.

57. As to the requirement that the pension fund must be a permanent program, the US WHT Applicants were not set up to be permanent. They were only intended to operate for so long as the Principal WHT Scheme (alternatively, the Solo WHT Scheme, the Donaldson/LaRosa WHT Scheme and/or the Klar WHT Scheme) continued.<sup>53</sup>

58. As to the funding of those US WHT Applicants and the US ED&F Man Applicants that were 401(k) plans:

58.1 Pursuant to §415(c) of the IRC, contributions to a 401(k) plan are limited to the lesser of \$40,000 or 100% of the contributing employee's compensation from the employer.

58.2 Pursuant to §401(a)(1) of the IRC, contributions to a 401(k) plan may only be made by the employers, employees or charitable remainder trusts.

58.3 Pursuant to §415, the maximum permissible contribution by each employee to a 401(k) plan was limited to: (a) \$51,000 in 2013; (b) \$52,000 in 2014; and (c) \$53,000 in 2015.

<sup>51</sup> RRAPOC, paragraph 24(e)(v).

<sup>52</sup> RRAPOC, paragraphs 24(i)(ii)(c) and 24(i)(iii)(F)(4).

<sup>53</sup> Many US WHT Applicants were only set up shortly before they started submitting WHT Applications to SKAT: RRAPOC, paragraph 24(b)(ii).